APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED FEBRUARY 5, 2003

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-1167
D.C. No. 00-WM-1863
(D. Colorado)

PEGGY A. GALLO-LOEKS,

Plaintiff - Appellant,

v.

U S WEST COMMUNICATIONS, INC.,

Defendant - Appellee.

ORDER AND JUDGMENT*

Before **EBEL**, **BALDOCK**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Peggy A. Gallo-Loeks appeals the district court's summary judgment in favor of her employer, U S West, on her claims that U S West engaged in reverse discrimination in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-402. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

Ms. Gallo-Loeks, who is white, was disciplined after she submitted a request for tuition reimbursement from an educational provider that was not eligible for tuition reimbursement. When she was informed that the provider was ineligible, Ms. Gallo-Loeks submitted additional documentation and received reimbursement. Following an investigation that included her explanation for the confusion over the billing, Ms. Gallo-Loeks was required to repay the tuition money, she was placed on warning of dismissal for one year, and an entry was placed permanently in her employment file.

During the approximate time period that Ms. Gallo-Loeks was investigated and reprimanded, another employee was the subject of an investigation into her use of a company credit card. The other employee, Ms. Christian, is an African-American. Ms. Christian used the credit card to charge two days' personal use of a rental car, which was a change from the original authorization for a rental car. Although she had

obtained a supervisor's prior permission for the car expense, it was determined that she had used bad judgment by not reconfirming her travel plans. She received a warning and was required to reimburse her employer for the two days' rental car charge.

Based on these circumstances, Ms. Gallo-Loeks claimed that U S West treated her less favorably than Ms. Christian, in violation of Title VII and Colorado state law. She asserted that she was reprimanded more severely than Ms. Christian because she is white.

The district court first considered whether Ms. Gallo-Loeks established a prima facie case under the familiar *McDonnell Douglas* burden-shifting scheme, whereby the plaintiff must first establish a prima facie case of discrimination, after which the employer must present a nondiscriminatory reason for the challenged workplace action. *Notari v. Denver Water Dep't,* 971 F.2d 585, 588 (10th Cir. 1992) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). If those conditions are met, the plaintiff then has an opportunity to show that the proffered reason was a pretext for discrimination. *Id.*

In evaluating Ms. Gallo Loeks' prima facie showing, the district court applied the *Notari* standard. Under *Notari,* for a reverse discrimination claimant to establish a prima facie case of discrimination under the *McDonnell Douglas* paradigm, she must "establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Id.* at 589. After finding that Ms. Gallo Loeks had not made the requisite

allegations of background circumstances, the district court evaluated whether she had produced direct evidence of discrimination or indirect evidence that made it reasonably probable that she would have been treated more favorably but for her status as a white person. Appellant's App. at 247 (citing *Notari,* 971 F.2d at 590). The district court determined that Ms. Gallo-Loeks had not offered any direct evidence of discrimination. *Id.* at 249 & n.4. Therefore, the district court examined the indirect evidence of discrimination and concluded that Ms. Gallo-Loeks had "not produced evidence 'to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.'" *Id.* at 252 (quoting *Notari,* 971 F.2d at 590). Accordingly, the district court granted summary judgment in U S West's favor on the Title VII claims. Because Ms. Gallo-Loeks did not argue that a different standard or analysis applied to the state-law claims, the district court granted summary judgment in U S West's favor on those claims, as well.

Ms. Gallo-Loeks appeals, arguing that this court should abandon the *Notari* requirements for a prima facie case in a reverse discrimination claim. She also challenges the district court's conclusion that her indirect evidence of discrimination was insufficient to resist summary judgment. She does not claim that she had direct evidence of discrimination.

Analysis

We review de novo the district court's grant of summary judgment, viewing the record in the light most favorable to the party opposing summary judgment. *McKnight v. Kimberly*

Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

We decline Ms. Gallo Loeks' invitation to abandon *Notari,* because one panel of this court cannot overrule the judgment of another, "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1229 (10th Cir. 2001) (further quotation omitted).

We have carefully reviewed the record on appeal, as well as the briefs submitted by the parties. Applying the standards set out above, we affirm the judgment for the reasons stated in the district court's March 22, 2002 order on motion for summary judgment.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 22, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 00-WM-1863

PEGGY A. GALLO-LOEKS,

Plaintiff,

v.

U.S. WEST COMMUNICATIONS, INC.

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller, J.

This matter is before me on the defendant's motion for summary judgment, filed July 20, 2001. I have considered the parties' written arguments and their tendered evidence and have determined that oral argument is not required. For the reasons that follow, the motion will be granted.

Appendix B

Background

Plaintiff Peggy Gallo-Loeks brings claims for reverse race discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-2000e-17, and the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.

The following summary is drawn from the parties' factual statements in the summary judgment briefs.[1]

Plaintiff, who is Caucasian, has been employed by US West for approximately twenty-two years. She was worked as a directory records clerk, frame attendant, and central office technician; when she was a frame attendant, she was supervised by Edna Haliburton, an African-American woman.

Plaintiff's allegations of discrimination arise from events surrounding her claims for tuition reimbursement under a benefit program available to US West employees. She was temporarily suspended in 1998 on grounds of submitting false information to Pathways, a third-party administrator of the tuition reimbursement program.

Among the approved classes for the tuition reimbursement program were classes available at the Arvada Center for the Performing Arts. Sometime in early-to-mid 1997, plaintiff attempted to enroll in a voice-over talent workshop at the Arvada Center taught by George Flynn. The class was full, and she was placed on a waiting list. She left several voice messages for Mr. Flynn indicating her interest in the workshop; several months

1. Plaintiff did not comply with my pretrial procedures regarding responding to defendant's statement of undisputed facts in separately numbered paragraphs.

later, Mr. Flynn's daughter informed plaintiff that he had openings in another workshop. She enrolled in that class and others, all taught by Mr. Flynn.

Plaintiff later sought reimbursement for her classes by submitting forms provided by Pathways. Pathways refused to approve her request because the classes were not offered by an eligible provider. Before leaving on a vacation, plaintiff resubmitted her form, indicating that the provider "should be" the Arvada Center; she included two receipts, in the combined amount of $675, from Mr. Flynn with "Arvada Center for the Arts Statement" at the top. Upon learning that the statements were not from the Arvada Center, Pathways asked that plaintiff submit other receipts showing she had paid the Arvada Center for the classes. Plaintiff does not recall ever providing additional receipts. She was apparently successful in obtaining reimbursement for her classes.

Betty Sweeny, a Pathways employee, notified US West that plaintiff may have submitted false information to obtain tuition reimbursement.

When plaintiff returned from her vacation, her supervisor, Jim Tarantino, notified her that she was the subject of a security investigation. When she called Pathways, she was informed that Mr. Flynn was not a teacher at the Arvada Center, that she was not a student there, and that she had never taken the classes for which she sought reimbursement. She contacted Mr. Flynn for information regarding the classes. Mr. Flynn provided her with a letter indicating that she had attended a workshop put together to accommodate students who were unable to attend the Arvada

Center classes and that he and plaintiff had mistakenly assumed she was an Arvada Center student. Plaintiff's union representative, Mary Sue Curtis, submitted Mr. Flynn's letter to US West along with other information, including brochures for the class through the Arvada Center and Mr. Flynn's resume.

Denise Hayden, a US West security manager, investigated plaintiff's reimbursement claim. After a first security meeting was cut short when plaintiff was not allowed to have two union representatives present (although two company representative attended), Ms. Curtis asked Ms. Hayden whether the packet of information submitted resolved any concerns and whether the investigation would be closed soon. Ms. Hayden responded that she was keeping the case open.

At a second security meeting, Ms. Hayden stated that US West believed plaintiff had engaged in fraud by submitting a receipt for reimbursement.

In early October 1998, Ms. Haliburton informed plaintiff that she was on suspension for two weeks. Plaintiff was ordered to repay approximately $700 within thirty days or be terminated, she was placed on warning of dismissal for one year, and an entry of the discipline was placed in her permanent file.

In this lawsuit, plaintiff argues her treatment by US West was the result of reverse race discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-2000e-17, and the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.

Appendix B

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying 'a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). Then, "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Id.*

In this employment case, plaintiff bears the initial burden of presenting a *prima facie* case of discrimination. US West must then produce evidence that it acted upon legitimate, non-discriminatory reasons. If this burden is met, plaintiff must prove that the reasons offered by her employer were a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1824 (1973).

Appendix B

Discussion

In *McDonald v. Santa Fe Trail Trans. Co.*, 96 S.Ct. 2574, 2579 (1976), the Supreme Court held that Title VII prohibits racial discrimination against white persons "upon the same standards as would be applicable" for allegations brought by blacks. "[Title VII's] terms are not limited to discrimination against members of any particular race." *Id.* at 2578.

1. *Prima Facie Case*[2]

US West first argues that plaintiff cannot establish a *prima facie* case of racial discrimination.

Plaintiff's discrimination claims are based on her allegation that US West subjected her to disparate treatment, *i.e.*, that it treated her less favorably than similarly situated black employees. Under such circumstances, the *McDonnell Douglas* formulation of a *prima facie* case generally requires a demonstration that: (1) the plaintiff belongs to a protected group, (2) she suffered an adverse employment action, and (3) her employer treated similarly situated employees differently. *Trujillo v. University of Colorado Health Sciences Center*, 157 F.3d 1211, 1215 (10th Cir. 1998).

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2. In the first two briefs, neither party clearly moves beyond the *prima facie* analysis to any argument regarding the legitimacy of US West's proffered reasons for plaintiff's suspension or to evidence of pretext (although plaintiff states conclusorily that the indirect evidence for her *prima facie* case is sufficient to demonstrate pretext. Response, at 13). In its reply brief, however, US West discusses plaintiff's arguments in terms of pretext.

Appendix B

In cases concerning reverse race discrimination, however, the Tenth Circuit applies a modified *prima facie* case analysis. *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). Under this modification,

> a Title VII disparate treatment plaintiff who pursues a reverse discrimination claim, and seeks to obtain the benefit of the *McDonnell Douglas* presumption, must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority.

Id. at 589. *See also Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997). "The *McDonnell Douglas* presumption-that is, the presumption that unless otherwise explained, discrimination is more likely than not the reason for the challenged decision is valid for a reverse discrimination claimant only when the requisite background circumstances exist." *Notari*, 971 F.2d at 589.

The *McDonnell Douglas* formulation is not the only manner in which plaintiff may establish a *prima facie* case, however. She may also meet her burden with: (1) direct evidence of discrimination; or (2) indirect evidence sufficient to support a reasonable probability, that but for her status the challenged employment decision would have favored the plaintiff. *Id.* at 590. A plaintiff who relies on such direct or indirect evidence, "is not entitled to rely on the presumption that is implicit in the *McDonnell Douglas prima facie* case analysis." *Id.*

> In other words, it is not enough, under this alternative formulation, for a plaintiff merely to allege that he was qualified and that someone with different characteristics was the beneficiary of the challenged employment decision. Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.

Id.

US West contends plaintiff cannot meet her *prima facie* case because she has no evidence suggesting that it is "one of those unusual employers who discriminates against the majority." In her deposition, plaintiff conceded that she never heard any member of US West's (or Qwest's) management make any remarks about race and that she had been employed by US West for approximately twenty years before she experienced any alleged racial discrimination. Gallo deposition, at 30, 308. In the Voice Messaging section where plaintiff worked, the majority of central office technicians and managers are Caucasian. *Id.* at 39-42.

In her response (which is not well-organized), plaintiff argues the evidence that US West is an "unusual" employer who discriminates against the majority is that US West treated black employees more favorably. She summarizes her *prima facie* case as consisting of proof that: (1) she was a qualified white female employee, (2) she was suspended without pay, (3) a black co-worker violated company policies but was not disciplined.

Appendix B

Plaintiff equates two elements of her *prima facie* case (that she was subjected to an adverse employment action and that a similarly situated black employee was treated differently) with "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Notari*, 971 F.2d at 589. This does not meet the modified *prima facie* case set forth in *Notari*.[3]

US West next argues that plaintiff does not have direct evidence of discrimination[4] or indirect evidence that would support a reasonable probability that she would not have been suspended but for the fact that she is white. On the issue of indirect evidence of disparate treatment, it asserts that plaintiff cannot demonstrate a probability that she was suspended because of her race in light of the evidence that many different individuals were involved in the investigatory and decision-making stages of her discipline.

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3. Plaintiff later argues that the modified *prima facie* case of *Notari*, placing a higher burden on her simply because she is a member of a "majority" is "a blatant form of discrimination in itself." Response, at 13-14. She cites *Notari*'s discussion of this very fact but omits its conclusion: that to counterbalance the higher *prima facie* burden under the *McDonnell Douglas* presumption analysis, a reverse discrimination plaintiff may also present a *prima facie* case with "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff[.]" *Notari*, 971 F.2d at 590.

4. Plaintiff does not argue that there is direct evidence of discrimination in this case.

Appendix B

US West states that Ms. Hayden investigated plaintiff's claim for reimbursement to Pathways, that Ms. Haliburton did not provide any relevant information to Ms. Hayden in the investigation, and that the participants in the decision to suspend plaintiff were Melanie Curry (Caucasian), Dana Tonelli (Caucasian), Ms. Haliburton (African American), and Donna McNamara (Caucasian). Haliburton deposition, at 20-22.

Finally, US West contends that plaintiff and the targeted black employee, Audrey Christian, were not similarly situated, either with respect to the persons involved in the decision-making process or with regard to the nature of their offenses. The investigation against plaintiff concluded that she had submitted false information and documents to Pathways to obtain tuition reimbursement.

Ms. Christian charged personal expenses to a company credit card in connection with a training session in Milpitas, California. Ms. Christian had obtained prior permission from her manager, Peggy Moore, to take two days vacation in Los Angeles prior to the training session and to charge two day's personal use of a rental car to the company credit card. When the training schedule changed, Ms. Christian's husband flew to Los Angeles, rented the car, and drove to Milpitas to meet her; Ms. Christian did not discuss the payment for the rental car with Ms. Moore after her training session was changed. In investigating Ms. Christian's conduct, Ms. Haliburton spoke to Ms. Moore, who confirmed that she had given Ms. Christian permission to charge the company for two day's personal use of a rental car. Ms. Haliburton concluded that Ms. Christian had not submitted a false expense report or

improperly charged the company for personal expenses because she had prior permission from Ms. Moore. Ms. Haliburton found Ms. Christian had used bad judgment in not re-confirming the arrangements after the training schedule changed. Ms. Christian received a warning and was required to reimburse the company for the two days' use of the rental car.[5] Ms. Haliburton contacted Ms. Currie, a human resources representative, about Ms. Christian's conduct; Ms. Currie determined the matter did not warrant a security investigation.

In support of her claim that there is indirect evidence establishing a reasonable probability that she was the victim of race discrimination, plaintiff states the following: (1) her suspension was "entirely unwarranted" because she reasonably believed she was taking the class through the Arvada Center (and she had no part in preparing the receipts she received from Mr. Flynn), (2) Audrey Christian misused the company credit card but was not subjected to a security investigation or other discipline, and (3) "[obviously, the discipline [plaintiff] received was more severe than Ms. Christian's." Response, at 13.

Plaintiff later provides a more concrete analysis of the issue of whether she and Ms. Christian were similarly situated. She states that they were both in the same work group and were supervised by Mr. Tarantino and that Mr. Tarantino reported to Ms. Haliburton during the relevant time period.

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5. There may be some dispute over whether reimbursement was ordered. Plaintiff seems to believe, based on Mr. Tarantino's deposition, that she did not have to repay the rental charges. Tarantino deposition, at 83-84.

Plaintiff does not dispute, however, that the employment/ disciplinary decisions were made by different people.

Plaintiff also cites differences in the investigations, stating that, contrary to usual practice, her supervisor, Mr. Tarantino, was not involved in her investigation; instead, the investigation involved Pathways, security personnel and Ms. Haliburton. She says she was treated differently in this respect from other employees under Mr. Tarantino's supervision, but she does not provide any evidence regarding whether these employees were black or white.

Next, plaintiff states that another US West employee had taken the same class as she had and had been reimbursed by Pathways; again she provides no evidence regarding whether this employee was black or white.

Finally, plaintiff makes general statements that Ms. Christian was "treated more favorably with respect to scheduling, overtime, security investigations, shifts and days off." Response, at 11. Although she cites excerpts from Ms. Curtis's deposition, there is no evidence regarding who made the challenged decisions in favor of Ms. Christian nor any evidence that any other employees were treated less favorably in any of the cited areas.

2. *Proffered Reasons/Pretext*

US West suspended plaintiff based on its conclusion that she had submitted a false application for reimbursement to Pathways. Plaintiff argues she reasonably believed she had taken the class through the Arvada Center.

In reply, US West states that her reasonable belief is irrelevant to the validity of its stated reasons for her suspension. *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) (issue is not whether employer's proffered reasons were "wise, fair or correct," but whether employer "honestly believed those reasons and acted in good faith upon those beliefs"). It points out that she presented no evidence that it did not believe she had submitted false information or that it failed to act in good faith based on the results of the security investigation.

With regard to the comparison of plaintiff and Ms. Christian, US West replies that there is no dispute that Ms. Christian had prior permission for the use of the credit card for the rental car. It states that, to establish pretext, plaintiff must demonstrate some nexus between the decision to suspend her and the cited evidence of pretext. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209-10 (10th Cir. 1999).

With respect to plaintiff's cited evidence that Ms. Curtis believed Ms. Christian received more favorable treatment than other employees, US West contends the testimony is based on hearsay statements from other employees.

I agree with US West that plaintiff has not produced evidence "to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Notari*, 971 F.2d at 590.

Appendix B

3. *State Law Claim*

Although US West argues Colorado courts have not recognized a cause of action for reverse discrimination, plaintiff treats her federal and state claims together and does not argue that any different standard or analysis applies under Colorado law.

Thus, my conclusion on the Title VII claim covers the state law claim as well.

Accordingly, it is ordered:

1. Defendant's motion for summary judgment, filed July 20, 2001, is granted.

2. Judgment shall enter in favor of defendant and against plaintiff on all claims, dismissing this case with prejudice.

3. Defendant may have its costs.

DATED at Denver, Colorado, this 22nd day of March, 2002.

BY THE COURT:

s/ Walker D. Miller
Walker D. Miller
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 25, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 00-WM-1863

PEGGY A. GALLO-LOEKS,

Plaintiff,

v.

U.S. WEST COMMUNICATIONS, INC.,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Order entered on March 22, 2002, by Judge Walker D. Miller, which is incorporated herein by reference as if fully set forth, it is

ORDERED that defendant's motion for summary judgment, filed July 20, 2001 is granted. It is

FURTHER ORDERED that judgment shall enter in favor of defendant U.S. West Communications, Inc. and against plaintiff Peggy A. Gallo-Loeks. It is

Appendix C

FURTHER ORDERED that the complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that defendant may have its costs upon filing a bill of costs within ten days of entry of judgment.

DATED at Denver, Colorado, this 25th day of March, 2002.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk